QUESTIONS PRESENTED

Whether, when enacting the Federal Service Labor-Management Relations Statute, Congress clearly expressed an intent to authorize those employees whose salaries are not set by statute to continue to bargain over wages as they had under the Executive orders that previously governed Federal sector collective bargaining? If Congressional intent is silent or ambiguous with respect to this issue, whether the FLRA's finding that wages are a negotiable "condition of employment," except when specifically set by statute, is a permissible construction of the FSLMR Statute?

Whether the FLRA's finding that the Army failed to demonstrate that the Association's compensation proposals would interfere with management's authority to determine the budget of the agency was arbitrary and capricious?

Whether the FLRA's finding that the Army failed to demonstrate a compelling need for a regulation that provides that salary schedules for the teachers at its dependents schools should be equal to those in neighboring public school districts was arbritrary and capricious?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-65

FORT STEWART SCHOOLS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT FORT STEWART ASSOCIATION OF EDUCATORS

STATEMENT

The Fort Stewart Association of Educators (an affiliate of the National Education Association) is the certified collective bargaining representative of the 114 teachers, 94 teacher assistants, 10 clerical workers, and 12 custodial workers employed by the Army at two elementary schools at Fort Stewart, Georgia. The negotiability dispute in this case arose during the negotiations that took place during the fall of 1984 for the Association's first collective bargaining agreement and concerns employee compensation and leave.

The salaries for teachers at Fort Stewart are ostensibly set by the Army based on a survey of the salaries paid to teachers in three public school districts of Georgia. Not all teachers at Fort Stewart are paid the same

salary, of course. The salary schedule developed by the Army has a different pay lane for each of four levels of academic attainment—bachelor's degree, master's degree, "educational specialist" for those with a specialized six-year degree, and doctoral degree. Within each pay lane are eighteen steps[1]—one for each creditable year of teaching experience. The higher a teacher's educational attainment and the greater his or her years of teaching experience, the higher his or her pay. The paraprofessional teacher assistants represented by the Association have their own salary schedule based on years of experience.

The text of the proposals at issue are found in the Federal Labor Relations Authority's decision and are reproduced in appendix B to the petition for certiorari. The Association's proposal for article 25 is identified as proposal 1 in the FLRA's decision. Article 25, §§ a-g concern the manner in which the results of the Army's annual pay survey are applied to Fort Stewart teachers. Article 25(a) sought to contractually commit the Army to base its salary survey on the practices in three particular school districts and to consult with the Association in the annual development of the salary schedule. Article 25(b) would require the Army to establish four more steps in each pay lane so that teachers would get an experience-based salary increase for up to twenty years of teaching experience instead of sixteen. Article 25(c) would have required the Army to establish the same pay lanes for different levels of academic attainment established by the Georgia school districts surveyed. Article 25(d) requires the Army to supply the survey data to the Association for independent analysis. Article 25(e) would require that whatever annual salary increase is justified on the basis of the survey of local

[1] At the time of negotiations, the salary schedule contained sixteen steps.

school districts should be applied "across the board." That is to say, each teacher on each step of each pay lane should be given the same percentage increase. Article 25(g) provides that when a teacher obtains a higher degree during the course of a particular school year, she will be placed in the next appropriate pay lane retroactive to the start of the school year. Pet. Cert. 31a-33a.

The other subsections of article 25 pertain to other pay and benefit practices. Article 25(h) concerns the pay of the clerical and janitorial staff represented by the Association. Although all Section 6 school employees are exempted from the coverage of the Classification Act, 5 U.S.C. § 5101, *et seq.*, and other Federal pay laws by 20 U.S.C. § 214(a), the Army has chosen to peg the salaries paid to noneducational personnel at the Fort Stewart Schools and at other Section 6 schools to the General Schedule pay rates applicable to other Federal employees covered by the Classification Act who hold comparable positions. *See generally In the matter of Fort Rucker Elementary School Employees*, 58 COMP. GEN. 430 (1979). The Association proposed in article 25(h) that the procedure that the Army was using to set the pay of clerical and custodial workers be continued. Article 25(i) would require the Army to pay summer-school teachers the same rate of pay, computed on an hourly basis, that they would receive during the regular academic year. Article 25(j) would entitle any bargaining unit member whose services are terminated by the Army to receive the value of his or her unused sick leave in a lump-sum payment. The Association's proposals for articles 25(n) and (o) are quite innocuous. They merely require the Army to continue to give unit employees those health insurance, life insurance, retirement, and other benefits that they already receive pursuant to law. Pet. Cert. 33a-34a.

During the course of negotiations, the Association also made an alternative proposal to give all unit employees a 13.5% salary increase for the 1984-85 school year.

This is identified as proposal 2 in the FLRA's decision. Pet. Cert. 34a. The proposal is not as generous as it seems at first blush. The teachers at Fort Stewart received a 6.8% pay increase at the beginning of the 1984-85 school year and an additional midyear pay raise of 4%, anyway. The Association proposed, in effect, only a 2.7% wage increase for teachers.

Proposal 3 in the FLRA's decision under review concerns employee-leave entitlement and procedures. Pet. Cert. 48a-53a. The text of this proposal is an Association counterproposal that incorporates various sections initially *proposed by management*. Many of the provisions are nothing more than a memorialization of the existing written and unwritten leave practices at the Fort Stewart Schools. For example, section 1 provides that the clerical and custodial staff be entitled to the same leave that Federal employees usually receive under civil service leave statutes and regulations. Section 1 was management's proposal and is existing practice. Although all Section 6 school employees are exempt from mandatory coverage of the standard Federal employee-leave laws, the Army has in its discretion applied the provisions of those laws to the support staff at its schools, just as it has voluntarily applied the General Schedule pay scales of the Classification Act. Proposed section 2(a) grants each teacher 13 days of sick leave each year. This proposal was lifted from the teachers' individual personal service contracts.[2] Section 2, subsections (a)(1) and (a)(2)

[2] Each teacher at Fort Stewart and most other Army Section 6 schools is given an annual personal service contract even though two circuits have held that their use by the Army is illegal. *Fort Bragg Association of Educators, NEA v. FLRA*, 870 F.2d 698 (D.C. Cir. 1989); *West Point Elementary School Teachers Association v. FLRA*, 855 F.2d 936 (2nd Cir. 1988). The Army selectively incorporates various terms and conditions of a teacher's employment in these personal service contracts. The FLRA has ruled that the use of the personal service contracts does not diminish the Army's collective bargaining obligations and that the provisions

concern the conditions under which teachers may take sick leave. These proposals, along with proposed section 2(a)(7), which requires management and the Association to discuss the establishment of a sick-leave bank, were eventually agreed to by the parties after the negotiability appeal was filed and were incorporated into the parties' collective bargaining agreement of January 9, 1985, as article 24, sections 1, 2, and 3.[3] This agreement is still in force. Subsections a(3), a(4), and a(5) place limits on the ability of unit employees to use sick leave and involve no cost to the Army. Subsections (a)(3) and a(4) were management's proposals. They were included in the negotiability appeal when management broadly declared that all leave proposals were nonnegotiable.[4]

Section 2(b) of the leave proposal permits teachers to use three days of sick leave each year for personal reasons. This is also current practice at the Fort Stewart Schools. Subsection 2(b)(3) is also a management proposal.

Section 2(c) of the leave proposal establishes a procedure by which management *may* grant teachers a year of *unpaid* leave for "advanced study, research, professional writing and other experience of recognized value

of a collective bargaining agreement prevail over contradictory provisions contained in the personal service contracts. *West Point Elementary School Teachers Association, NEA and the United States Military Academy Elementary School, West Point, New York*, 29 F.L.R.A. 1531, 1533 (1987).

[3] The Fort Stewart collective bargaining agreement was subject to and did receive agency head approval pursuant to 5 U.S.C. § 7114(c). The Association is without explanation why the Army subsequently included these proposals within the scope of its petition for review of the Authority's decision in the Eleventh Circuit.

[4] *See* October 22, 1984, letter of Malcolm Katz attached to the Association's November 8, 1984, negotiability appeal, reproduced at p. 5 of Certified Extracts of Record in the court of appeals.

in an employee's respective field." [8] Subsections 2(c)(1) through 2(c)(4) were management proposals.

Section 2(d) provides that employees summoned to jury duty will receive paid court leave. This management proposal is current practice. FORT STEWART SCHOOLS TEACHER HANDBOOK, 32 (1989-90 ed.) Its provisions are identical to the civil service laws and regulations applicable to other Federal employees. *See* 5 U.S.C. § 6322; OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, chapter 630, subchapter 10.

Finally, section 2(e) would entitle employees to use sick leave for maternity purposes and leave without pay for paternity and adoption leave. These, too, were management's proposals, which were subsequently declared nonnegotiable by management.

SUMMARY OF ARGUMENT

1. The Federal Service Labor-Management Relations Statute permits Federal sector unions to negotiate over those "conditions of employment" that are not "specifically provided for by Federal statute." The plain meaning of the term "conditions of employment" encompasses employee compensation. Congress used the term "conditions of employment" synonymously with "wages" and

[8] With the exception of subsection 2(c)(7), which allows unit employees to attend professional conferences and workshops *subject to the school superintendent's approval*, this proposal entails *no cost* to the Army. The cost entailed in subsection 2(c)(7) would be voluntarily incurred by the Army inasmuch as the use of the five days of excused absence with pay for conferences and workshops is subject to the school's approval or disapproval on a case-by-case basis. Similarly, proposed sections 2(e)(2) and 2(e)(3) would establish paternity and adoption leave *without pay*. The Association is also without explanation why these proposals have been included among those for which review is sought by the Army since they have nothing to do with pay or pay-related fringe benefits.

"rates of pay" in another major Federal collective bargaining statute on which the FSLMR Statute was based, the National Labor Relations Act.

"Conditions of employment" is defined in the FSLMR Statute as "personnel policies, practices and matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14). That definition was taken directly from the Executive orders that governed Federal sector collective bargaining prior to the enactment of the Statute. Under the Executive orders, those employees whose salaries were not set by law bargained over wages. The Federal Labor Relations Council had ruled that wages for such employees were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a)" of Executive Order No. 11,491.

When Congress enacted the FSLMR Statute, it expressly intended to codify the full scope of bargaining that existed under the Executive orders. When referring to the right of certain employees to negotiate over wages, one of the statute's sponsors stated, "we should not now be narrowing the preexisting collective bargaining rights of any group of Federal employees." Congress went so far as to add a savings clause to the Civil Service Reform Act, of which the FSLMR Statute is a part, to preserve the right of skilled crafts workers who had bargained over wages since the first Executive order and before but who had since fallen under the coverage of the Prevailing Rate Act of 1972 and who would no longer be able to negotiate over wages because their pay became "specifically provided for by Federal statute." This demonstrates that Congress intended to preserve the full panoply of bargaining rights, including the right to negotiate over pay, that employees had enjoyed before the enactment of the FSLMR Statute.

The legislative history of the statute contains statements of various members of Congress indicating that pay would not be negotiable under the statute. It is clear,

however, that they were talking in general terms, assuring their colleagues that the bargaining provisions of the statute would not override other Congressionally enacted pay laws applicable to the overwhelming majority of Federal employees. These statements cannot be read as an intent to preclude negotiations over wages in all circumstances. Such a reading would conflict with the overriding purpose of the statute, which was simply to codify the bargaining rights that had been created by the Executive orders and would conflict with the savings clause Congress adopted to preserve skilled crafts workers' right to negotiate over wages despite the Prevailing Rate Act.

Even if the Court finds the legislative history to be ambiguous or contradictory on this issue, the Federal Labor Relations Authority's construction of the statute is permissible and reasonable, and the Court should defer to it. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

2. The management rights clause of § 7106 was also adopted from the earlier Executive orders. The agency's right to determine its budget was not interpreted to preclude wage bargaining under the Executive orders. In enacting the FSLMR Statute, Congress clearly stated that the management rights clause should be construed more narrowly than it had been under the Executive orders. Therefore, § 7106 should not be construed to preclude negotiations over a matter that was previously subject to bargaining.

The court of appeals correctly ruled that in order to determine whether the Association's wage proposal interferes with the agency's right to determine its budget, the cost of the proposal must be judged against the budget of the agency as a whole, not just the budget of the program in which the teachers are employed. Even if the cost of the 13.5% wage proposal is judged on a school-level basis, the cost of the proposal is not significant.

The teachers at Fort Stewart received a 10.8% wage increase during the 1984-85 school year, and the difference of 2.7% could be offset by increased employee productivity or by reallocation of funds from some other aspect of the schools' program.

3. Only one of the Association's proposals is inconsistent with Army Regulation 352-3 and then only as applied to some, but not all, unit employees.

Although 20 U.S.C. § 241(a) requires that the Army provide its students with an education that is comparable to that provided in surrounding local school districts, § 241(a) does not require that the salaries paid to Section 6 school employees be equal to those paid in local public schools. Although the language mandating comparable education was contained in the original version of § 241 enacted in 1950, it was not until a 1965 amendment to § 241 that the Army obtained even the discretion to deviate from the pay laws applicable to other Federal employees. Even today, the Army continues to peg the compensation of some Section 6 school employees to that paid to other Federal employees with comparable duties, rather than to that paid to employees of local public schools.

Section 241(e) only requires that per-pupil costs at Section 6 schools not exceed those in local school districts "to the maximum extent practicable." All of the military services that operate Section 6 schools have long ago discovered that it is "not practicable" to limit their expenditures to those of local public schools. Each of the services, including the Army, dramatically exceeds comparable per-pupil costs in the Section 6 schools it operates. Therefore, § 241(e) can no longer be used as a bar to bargaining.

Furthermore, identical salary schedules will not produce identical compensation costs or per-pupil expenditures. The compensation costs at Fort Stewart and in the Geor-

gia public schools are already unequal because of the difference in the costs of retirement programs and other statutorily mandated employee benefits.

Even assuming that per-pupil expenditures at Fort Stewart were equal to those in Georgia public schools, the cost of the Association's proposal for a further 2.7% wage increase could be offset by other economies in the schools' program or increased employee productivity so that overall per-pupil costs would remain the same.

ARGUMENT

I. WHEN ENACTING THE FSLMR STATUTE, CONGRESS EXPRESSLY INTENDED TO AUTHORIZE THOSE EMPLOYEES WHOSE SALARIES ARE NOT SET BY STATUTE TO CONTINUE TO BARGAIN OVER WAGES AS THEY HAD UNDER THE EXECUTIVE ORDERS THAT PREVIOUSLY GOVERNED FEDERAL SECTOR COLLECTIVE BARGAINING

A. An examination of the language of the FSLMR Statute reveals that wages are a negotiable condition of employment unless they are specifically provided for by statute. Federal employees have the right "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102. "Conditions of employment" is in turn defined as:

> . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). Nowhere is the right to negotiate wages excluded from the definition of "conditions of employment" unless the employee's wages "are specifically provided for by Federal statute." If Congress intended to exclude bargaining on wages under all circumstances, it could easily have included wages among these three exclusions or phrased exclusion (B) to read "relating to the *pay* and classification of any position."

It would be specious to argue, as petitioner has, that negotiations over "working conditions" are limited to the physical conditions under which an employee labors. This would exclude the bulk of subject matters presently negotiated by Federal sector unions, including personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by § 7121(a)(1). Such a limited reading of § 7103(a)(14) would effectively end collective bargaining in the Federal sector over everything but safety and office environment. If Congress had intended the definition of "conditions of employment" to be as limited as petitioner contends, there would have been no need to exclude from the definition "political activity" and "position classification." How can it be said that pay is not a working condition, but yet position classification, from which pay flows for most Federal employees, would be a working condition absent a specific exclusion?

The origin of the phrase "personnel policies, practices and matters . . . affecting working conditions" in § 7103 is no mystery. It was adopted verbatim from the earlier Executive orders governing collective bargaining in the Federal sector. The Executive orders provide a more reliable guide to discerning Congress's intended meaning of "conditions of employment" in the FSLMR Statute than do statutes unrelated to collective bargaining cited by petitioner that contain the same phrase. The

FLRA's predecessor, the Federal Labor Relations Council, held that wages were a negotiable working condition for employees whose compensation was not set by statute. The legislative history of the FSLMR Statute demonstrates that Congress's primary intent in enacting the statute was to codify the practices that arose under the Executive orders that had governed labor relations in the Federal sector without any diminution in the scope of bargaining. A statute should be construed so as to effectuate its "primary objective." *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982).

There is a long history of collective bargaining over wages in the Federal sector. At least as early as 1949, Congress exempted skilled crafts workers and semiskilled manual laborers from the Classification Act, which set Federal employees' pay. Act of Oct. 28, 1949, ch. 782, § 201, Pub. L. No. 81-429, § 201, 63 Stat. 954. The Bureau of Reclamation in the Department of Interior voluntarily has bargained over wages for such employees with such unions as the IBEW since the late 1940s. *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado and IBEW Locals 640, et al.*, 22 F.L.R.A. 758, 802-803 (1986).

In 1961, President Kennedy appointed a task force, chaired by Secretary of Labor Arthur Goldberg, to formulate recommendations on a governmentwide labor-relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that the Tennessee Valley Authority and several components of the Department of Interior had developed "relationships that are close to full scale collective bargaining" with trade unions. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961) *reprinted in* House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st

Sess., *Legislative History of the Federal Service Labor-Management Relations Statute*, 1187 (1979). The task force's report noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law." *Id.* at 1200. The task force recommended a governmentwide labor-relations program that would permit bargaining over wages if not otherwise set by statute:

> Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor employee relations, work shifts and tours of duty, grievance procedures, career development policies *and where permitted by law the implementations of policies relative to rates of pay and job classification.*

Id. at 1201 (emphasis added).

In a statement accompanying the published version of the task force report, President Kennedy directed that an Executive order be prepared to effectuate the task force's recommendations and noted "that where salaries and other conditions of employment are fixed by the Congress these matters are not subject to negotiations." *Id.* at 1178. Thus, those who developed the first governmentwide labor relations program intended that "salaries" were to be among the negotiable "conditions of employment" unless they were set by Congress.

Section 6(b) of Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), reprinted in 1962 U.S. CODE CONG. & AD. NEWS 4269, 4271, issued by President Kennedy, authorized negotiations over "personnel policy and practices and matters affecting working conditions"—the same language that now appears in the FSLMR Statute at 5 U.S.C. § 7103(a)(14). President Nixon revised the Federal government's labor-relations program by Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969). Section 11 of this Executive order required agencies to negotiate

"with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ."

Section 4 of Executive Order No. 11,491 established the Federal Labor Relations Council, comprised of the Chairman of the Civil Service Commission, the Secretary of Labor, and an official of the Office of Management and Budget, and authorized it to resolve disputes governing the negotiability of collective bargaining proposals. In 1972 the FLRC was called upon to resolve a negotiability dispute concerning the Department of Commerce's obligation to negotiate over a wage increase for professors at the Merchant Marine Academy. In *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972), the FLRC found that instructors at the academy were exempt from the Classification Act and that their salary proposals did not conflict with other Federal law, as was alleged by the Department of Commerce. The FLRC specifically held that the two wage proposals at issue were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a) of the Order." *Id.* at 218. One of the proposals would have increased the faculty's salary by approximately 10%. *Id.* at 212.

In another case, the FLRC held that several pay proposals made by the association that represents the teachers in DOD's overseas dependents schools were negotiable under Executive Order No. 11,491 because they did not conflict with the Overseas Teachers Pay and Personnel Practices Act. *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978). One of the proposals at issue in that case provided that DOD would establish extra pay lanes if they were justified by a survey of the practices in stateside school districts and is similar to the Association's proposal 1(e) at issue herein. Another proposal made by the overseas teachers and found negotiable by the FLRC

provided that summer-school teachers would be paid the same salary rate they received during the regular academic year. That proposal is identical in all material respects to the Association's proposal 1(i) at issue in the case *sub judice*.

The enactment of the FSLMR Statute in 1978 "constitute[d] a strong congressional endorsement of the policy on which the Federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 103 (1983). It is clear from the legislative history that Congress intended to expand, rather than constrict, the scope of bargaining that existed under the Executive orders. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2nd Cir. 1985), *cert. denied*, 474 U.S. 846 (1988).[6]

The Senate Report stated that "[t]he scope of negotiations under this section is the same as under section 11 (a) of Executive Order 11491." S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2826. Representative Derwinski stated that Title VII was intended to codify the existing bargaining practices, which developed under the Executive orders:

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[6] During early debate, Representative William Ford termed the expansion in the scope of bargaining "a very modest, incremental step." 124 Cong. Rec. 25,777 (1978). In later debate he stated that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order." 124 Cong. Rec. 29,138 (1978). Representative Clay stated that in drafting Title VII of the Civil Service Reform Act, which became the FSLMR Statute, "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [Federal Labor Relations] Council." 124 Cong. Rec. 29,187 (1978). *See also* Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices.").

> [T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.
>
> The substance of this amendment closely resembles the original program established by President Kennedy.

124 Cong. Rec. 29,188 (1978).

Thus, when it enacted the FSLMR Statute, Congress intended to preserve any and all collective bargaining rights that Federal employees enjoyed under the Executive orders—including, in limited circumstances, the right to bargain over wages. When referring to the right of prevailing-rate employees to negotiate over wages, Representative Ford stated, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (emphasis added). Despite the petitioner's claim that "it appears that Congress was unaware" of the FLRC decisions concerning pay negotiations, Congress is generally presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, ——, 108 S.Ct. 1704, 1711-12 (1988); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-20 (1983). When Congress adopts a new law incorporating sections of a prior law, Congress is presumed to know both the judicial and administrative interpretations of the incorporated law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress codified without change language contained in Executive Order 11,491, it knew of and did not intend a change in the judicial and executive interpretation of that language. *Florida National Guard v. FLRA*, 699

F.2d 1082, 1087 (11th Cir. 1983); *United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981). "One such existing practice allowed Federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits." *Fort Stewart Schools*, 860 F.2d 396, 402 (11th Cir. 1988) (citing *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972) and *OEA and DODDS*, 6 F.L.R.C. 231 (1978)).[7]

The petitioner has cited and analyzed the legislative history of the FSLMR Statute out of context. Although the Senate report does state that Title VII "excludes bargaining on economic matters," in the paragraphs immediately preceding that statement the Senate report makes clear that any collective bargaining rights that existed under Executive Order No. 11,491 were to be preserved by the new law:

> S. 2640 incorporates into law the existing Federal employee relations program. . . .
>
> The basic, well-tested provisions, policies and approaches of Executive Order 11491, as amended, have

[7] The failure of the House mark-up committee to adopt Representative Heftel's proposal to explicitly authorize pay negotiations so far as "consistent with law and regulation" is of no significance. The failure to enact suggested amendments is not the most reliable indication of Congressional intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983); *Bryant v. Yellen*, 447 U.S. 352, 376 (1980). Rather than indicating a desire to preclude pay negotiations by failing to adopt Representative Heftel's proposal, the committee may have viewed language that would explicitly authorize pay negotiations that were "consistent with law and regulation" as unnecessary surplusage inasmuch as the statute already authorized negotiations over *all* conditions of employment that are not provided for by statute. In *United States v. Wells Fargo Bank*, 108 S.Ct. 1179 (1988), this Court reasoned that the failure of the Finance Committee to adopt a specific proposal that project notes would be subject to estate taxes did not necessarily indicate a desire to exempt project notes from taxation. "Equally plausible is that the Committee omitted the express exemption as unnecessary." 108 S.Ct. at 1184.

> provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will promote effective labor-management relationships in Federal agencies.

Senate report, *id.*, at 12. Immediately preceding Representative Udall's statement that "we do not permit bargaining over pay," Mr. Udall also stated that the statute "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978). Similarly, although Representative Clay stated that "employees still . . . cannot bargain[] over pay," he also stated immediately afterward that the statute adopted a position that "moves slightly beyond" existing bargaining practices. 124 Cong. Rec. 24,286 (1978). Although Senator Sasser stated that "Federal employees may not bargain over pay or fringe benefits," he was describing, however mistakenly, the practice under Executive Order 11,491, *not* the new FSLMR Statute.[6]

When the legislative history is read in both its immediate and historical context, it is clear that the statements were merely assurances that, as a general rule, wages would continue to be nonnegotiable for the overwhelming majority of Federal employees whose pay is set by stat-

[6] In context, the quote from Senator Sasser reads:

> Currently, Federal labor relations are governed by Executive Order 11491, as amended. The Executive order establishes the right of Federal employees to belong to unions and establishes procedures for the recognition of bargaining units. But the Federal labor relations program continues to differ in substantive ways from that of the private sector.
>
> For one, Federal employees are not allowed to strike. Also, exclusive representatives of Federal employees may not bargain over pay or fringe benefits.

124 Cong. Rec. 27,549 (1978).

ute. For example, Representative Ford stated that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978). Representative Udall stated that "[t]here is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. 29,182 (1978). The court of appeals correctly concluded that:

> A close examination of the Congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. . . . Thus, although some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

Fort Stewart Schools, 860 F.2d at 401.

On the other hand, the legislative history reaffirms the principle, recognized as early as 1961 by the Goldberg task force, that any matters not specifically provided for by statute are negotiable. Representative Clay stated during debate:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular

> subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978).

B. The fact that Congress specifically authorized certain prevailing-rate employees to negotiate over pay in § 704 of the Civil Service Reform Act of 1978, 5 U.S.C. § 5343 note, does not indicate an intention to foreclose other employees from bargaining over pay. The Prevailing Rate Act, 5 U.S.C. § 5343, provides that the salaries of certain skilled crafts workers "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" paid to similar crafts workers in the private sector. As noted earlier, before the Prevailing Rate Act was enacted in 1972, many of the skilled crafts workers now covered by the Act negotiated over wages. Section 9(b) of the Act, Pub. L. No. 92-392, permitted those employees covered by the Prevailing Rate Act who negotiated over pay prior to its enactment to continue to do so. 5 U.S.C. § 5343 note. When Congress enacted the Civil Service Reform Act of 1978, it provided in § 704 that those employees who continued wage negotiations pursuant to § 9(b) could continue to do so, notwithstanding the Prevailing Rate Act, the premium pay provisions of Title 5, and any contrary provision of the FSLMR Statute.[9] But not for this "grandfather" clause, these prevailing-rate employees would no longer be able to negotiate over wages under the FSLMR Statute because their pay would be a matter "specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14)(c), namely the Prevailing Rate Act. Indeed, the FLRA has held that other Prevailing Rate Act

[9] There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972 and are thus grandfathered by § 704. OFFICE OF PERSONNEL MANAGEMENT, UNION RECOGNITION IN THE FEDERAL GOVERNMENT, at 331-332, 351-352, 390 (1987).

employees who did not bargain over wages prior to 1972 are now foreclosed from doing so for this reason. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988). Thus, § 704 was needed as an exception to the general rule that employees whose salaries are set by statute may not negotiate over wages; it has no bearing on the bargaining rights of those employees who are not subject to a pay-fixing statute.

Section 704 was also enacted to specifically overrule the effect of two Comptroller General decisions affecting Prevailing Rate Act employees and cannot therefore be taken as an indication of a desire by Congress to limit, by omission, the bargaining rights of other employees. In those decisions, the Comptroller General held that although § 9(b) exempted employees in certain bargaining units from the Prevailing Rate Act, the overtime provisions of 5 U.S.C. §§ 5541-5550 were still applicable and beyond the scope of bargaining. During debate, Representative Ford stated:

> During committee mark-up, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. . . . This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

124 Cong. Rec. 25,722 (1978). *See also* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978).

Thus, § 704 was added to overcome a roadblock to the bargaining rights of particular employees rather than as an exhaustive list of those employees who could negotiate

over pay issues. It does demonstrate, however, that Congress intended to preserve the right to negotiate over wages of all employees who had the ability to do so under the Executive orders. The petitioner offers no reason why Congress would have wanted to preserve the right of employees whose salaries were set by statute to bargain over wages under the FSLMR Statute and yet foreclose the right of those not established by law to continue wage negotiations. Section 704 also conclusively demonstrates that those members of Congress who stated during the debate that the FSLMR Statute does not authorize wage negotiations were speaking in general terms because they knew full well that certain insular groups of Federal employees would continue wage negotiations.

C. An examination of the language of the National Labor Relations Act also demonstrates that an employee's pay is a "condition of employment" in common and Congressional parlance. In Section 9(a) of the NLRA, 29 U.S.C. § 159(a), Congress included rates of pay and wages as examples of the conditions of employment over which exclusive representatives had the right to bargain:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in the unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment*: . . .

(emphasis added). The use by Congress of the words "or other" between "rates of pay, wages" and "conditions of employment," rather than simply the word "or," demonstrates that Congress considered the latter term to encompass the former. The meaning of "conditions of employment" is not limited to the subject "hours of employment," which immediately precedes the conjunction "or," as the petitioner claims. Pet. Br. 18. Each subject that precedes the conjunction is an item in a series, parallel

to each other, and of equal rank. If "conditions of employment" were limited to the subject immediately preceding the conjunction, § 159 would be written "rates of pay, wages, *or* hours of employment *and* other conditions of employment."

The language of § 8(d) of the NLRA, 29 U.S.C. § 158(d), which requires both unions and employers to negotiate in good faith over "wages, hours and other terms and conditions of employment," does not demonstrate that wages were a negotiable *term*, but not a *condition*, of employment, as petitioner contends. Pet. Br. 18. The Army's faulty analysis ignores the fact that wages are referred to only as a condition of employment in the following section of the NLRA and the fact that § 8(d) was not added to the NLRA until the Taft-Hartley amendments of 1947, some fourteen years after the NLRA was originally enacted as the Wagner Act of 1933. Congress added § 8(d) in order to impose a mutual obligation to bargain in good faith on both employers and unions, where the Wagner Act imposed such a duty on the employer only. T. KHEEL, 4 LABOR LAW § 16.02[2] (1979). Section 8(d) did not change the scope or subject matter of bargaining in any way. More importantly, the words "term" and "condition" are synonymous. *Roget's International Thesaurus*, ¶ 507.2 (4th ed. 1977).

II. THE ARMY HAS FAILED TO DEMONSTRATE THAT THE WAGE INCREASE SOUGHT BY THE ASSOCIATION WOULD INTERFERE WITH ITS RIGHT TO DETERMINE ITS BUDGET

If Congress intended employees such as dependents' schoolteachers to continue to negotiate over wages, it would not have intended a construction of the budget rights clause in § 7106(a)(1) that would foreclose such bargaining. Both Executive Order No. 10,988 and Executive Order No. 11,491, under which wage negotiations took place, contained provisions preserving an agency's

right to determine its budget. Section 6(b) of Executive Order No. 10,988 provided that the agency's bargaining obligation "shall not be construed to extend to such areas of discretion and policy as the mission of the agency, [or] its budget. . . ." 1962 U.S. CODE CONG. & AD. NEWS 4271. Section 11(b) of Executive Order No. 11,491 closely mirrors the current management rights clause of 5 U.S.C. § 7106. In pertinent part, it reads:

> [T]he obligation to meet and confer does not include matters with respect to the mission of the agency; *its budget*; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

1969 U.S. CODE CONG. & AD. NEWS 2954. (emphasis added).

This management rights clause was not construed to prohibit wage negotiations—even the proposal for a 10% wage increase found negotiable in *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*. Although Congress adopted most of the management rights enumerated in Executive Order No. 11,491, Congress intended that the management rights clause of § 7106 should be interpreted more narrowly than it was in the Executive order. Rep. Ford complained that the Federal Labor Relations Council's interpretation of the management rights clause "stifle[d]" collective bargaining, 124 Cong. Rec. 29,198 (1978), and that § 7106 should be "construed strictly." *Id.* at 29,199. Rep. Clay, one of the authors of § 7106, declared that "the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good

faith." *Id.* at 29,187. The House Committee on the Post Office and Civil Service stated that:

> The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program. . . . The committee intends that section 7106 . . . be read to favor collective bargaining whenever there is a doubt as to the negotiability of a subject or proposal.

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978). In light of this unequivocal expression of legislative intent, § 7106 *cannot* be read to preclude negotiations over a matter that was subject to bargaining before the statute's enactment.

Moreover, § 7106(a)(1) grants an agency the right to "determine" its budget. Proposals that merely have an economic cost without specifying what the agency's actual budget will be are negotiable. Virtually any collective bargaining proposal has some cost and impacts an agency's budget, including arbitration procedures and negotiations themselves.

The Army has no support for its argument that whether the union's proposals would significantly increase costs should be tested "by comparison with the expenditures of the program employing the bargaining unit employees, not the entire agency budget." Pet. Br. 29. The plain language of the statute is to the contrary. Absent a clearly expressed legislative intent to the contrary, the language of the statute must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 7106(a) states that "nothing in this chapter shall affect the authority of any management official of any agency—to determine the . . . budget . . . *of the agency*." (emphasis added). "Agency" is defined by the statute as "an Executive agency." 5 U.S.C. § 7103(a)(3). For the purposes of title 5, "Executive agency" means an Executive De-

partment, a Government corporation, and an independent establishment. 5 U.S.C. § 105. The Department of Defense is an Executive Department and thus an Executive agency; the Fort Stewart school system is not. 5 U.S.C. § 101.[10]

The Association's proposal for a 13.5% pay raise does not entail either an unavoidable or a significant increase in costs, even if judged on a school-level basis.[11] The teachers at Fort Stewart received a salary increase of 10.8% during the 1984-85 school year, anyway. Other unit employees also received wage increases that year. Proposals for wage increases do not necessarily entail *any* increase in an employer's operating budget. As in private, state, and municipal sector collective bargaining, the cost of a union's proposed wage increase can be offset by management-sought concessions on productivity. And, of course, if the Fort Stewart schools lack financial ability to pay a salary increase sought by the Association without adversely impacting its educational program, it should refuse to agree to the proposal, make its arguments to the Federal Service Impasses Panel pursuant to 5 U.S.C. § 7119(b). Budget and financial constraints of a public-sector employer are proper the kinds of factors consid-

[10] The Fort Stewart School does not have a separate line item in the President's annual budget. The Department of Defense lumps the expenditures for all the domestic and overseas dependents schools into one line item under the heading of "Operations and Maintenance—Defense Agencies." The amount sought by DOD for its dependents schools for FY 1990 was approximately $1.1 billion. DEPARTMENT OF DEFENSE APPENDIX TO THE BUDGET FOR FISCAL YEAR 1990, I-G10 (January 1989). If the cost of the Association's proposal is measured against the budget of the program employing the teachers, it should be measured against the budget figure for the Department of Defense Dependents Schools, which is the smallest line item in the President's budget that covers the teachers.

[11] The Army admits that proposal 1 and proposal 3 may not impact on the agency's budget rights. Pet. Br. 29 n.16.

ered in interest arbitration and impasse resolution. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 832-835 (4th ed. 1985).

III. THE ARMY HAS FAILED TO DEMONSTRATE THAT THE ASSOCIATION'S PROPOSALS ARE INCONSISTENT WITH ARMY REGULATION 352-3 OR THAT THERE IS A COMPELLING NEED FOR THAT REGULATION

Army Regulation 352-3, 1-7 states that education in Section 6 schools will be considered "comparable" to that in the local public school districts when, "to the maximum extent practicable . . . salary schedules" are equal. Only proposal 2, which calls for a modest salary increase for all unit employees over that which the Army gave them anyway, is inconsistent with this regulation, and then only as applied to teachers. Subsections a-g of proposal 1 are procedures by which the salary survey will be conducted and its results analyzed and applied in developing the teachers' salary schedule. Subsection h of proposal 1 asks the Army to continue its practice of pegging support-staff salaries to comparable General Schedule pay rates applicable elsewhere in the Federal sector. It is important to note that despite the Army's claim that salaries for Section 6 school employees must be identical to salaries of employees in local school districts, the Army completely ignores its own regulation when setting the salaries of the support staff in its Section 6 schools. Furthermore, there is no evidence that salaries of the paraprofessional teacher assistants at Fort Stewart or at the Army's other Section 6 schools are set based on a survey of paraprofessionals' pay in local school districts rather than at the whim of the Army. Subpart i of proposal 1 asks the Army to pay summer-school teachers the same salary, on an hourly basis, that they receive during the regular school year, which is, presumably, based on pay in local school districts. Subpart k concerns the rate at which employees will be reimbursed for official use of personally

owned vehicles and does not concern salary rates at all. Subparts n and o concern unit employees' statutory entitlement to health and life insurance and retirement benefits. Title 20 U.S.C. § 241(a) does *not* exempt Section 6 school employees from laws establishing Federal employee health and life insurance and retirement benefits. Therefore, the practices of local school districts in those matters are irrelevant.

Proposal 3 concerns employee leave, paid and unpaid. The Army's regulation calls for comparability of "salary schedules" and makes no mention of leave. As noted earlier, the support staff at the Fort Stewart schools receives the same leave benefits that other Federal employees receive. Most of the proposals for teacher leave are either an embodiment of current practice or management's initial proposals or both. There is no indication that any of the leave provisions or benefits for teachers in proposal 3 differ from that which local public school employees receive or that the Army takes local public school practice into consideration when establishing teachers' leave benefits.[12]

Inasmuch as the Army sets the salaries of clerical and custodial workers at the Fort Stewart schools without regard to either the practices in local public schools or its own regulation, proposal 2 is not in conflict with Army Regulation 352-3 as applied to those unit employees.[13]

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[12] The Marine Corps has elected to have all employees at its Section 6 schools at Quantico, Virginia, including teachers, governed by leave regulations and laws applicable to other federal employees, rather than by leave practices in local public schools. MARINE CORPS DEVELOPMENT AND COMBAT COMMAND ORDER P1755.1A, § 501.1(h)(1), reproduced as addendum F to the Association's brief in the court of appeals.

[13] There is no indication in the record or in reported case law how the Army determines the salaries of paraprofessional teacher assistants. The Army has made no specific claim during the proceedings below that these employees' salaries are based on practices in local school districts.

Besides the fact that the Army freely disregards its own regulation in setting the salaries of many unit employees, there is no compelling need for the regulation as applied to teachers for the following reasons:

A. Section 241(a) Does Not Either Explicitly or Implicitly Require That Salaries for Section 6 School Teachers Be Identical to Those Paid to Teachers in Local Public Schools

1. Although § 241(a) requires, to the maximum extent practicable, that the Army provide its students with an education comparable to that provided in the neighboring communities, there is nothing in the plain language of Section 6 that requires pay or leave comparability, except for schools outside the continental United States, Alaska, and Hawaii. The central purpose of § 241(a) is to provide quality education in Section 6 schools, rather than to establish conditions of employment. *Antilles Council of School Officers, Local 68, American Federation of School Administrators, AFL-CIO v. Lehman*, 550 F.Supp. 1238, 1244 (D.P.R. 1982). The only language concerning compensation or leave practices in § 241(a) states that personnel *may* be employed in Section 6 schools without regard to the pay and leave statutes applicable to most other Federal employees. Other than this broad grant of discretion, § 241(a) is silent on what the pay or leave practices should be. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

It is clear from a reading of the whole of § 241(a) that the Army and other agencies are given broad discretion to set salaries in schools within the continental United States, Alaska, and Hawaii. The third sentence of § 241(a), quoted above, sets a comparability standard for quality of education by mandating that education in Section 6 schools be comparable to public education in "comparable communities in the State," or, in the case of Section 6 schools outside the continental United States,

Alaska, and Hawaii, comparable to public education in the District of Columbia. The fifth, or next-to-last, sentence of § 241(a) reads:

> Personnel provided for under this subsection outside of the continental United States, Alaska and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia.

If "comparable salaries" were part and parcel of, and required by the language mandating comparable quality of education, this fifth sentence of § 241(a) would be unnecessary. However, a statute should not be construed in such a way as to render any provision surplusage. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2nd Cir. 1985); *Pacific Mutual Life Insurance Co. v. American Guaranty Life Insurance Co.*, 722 F.2d 1498, 1500 (9th Cir. 1984); *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982); *United States v. Wang Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). The fact that a specific pay comparability clause was included for some Section 6 schools but not for others should not be dismissed as fortuitous. When Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Rodriguez v. U.S.*, 480 U.S. 522, 525 (1987); *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Clear use of different terminology within the body of legislation is evidence of intentional differentiation. *Tafoya v. U.S. Dept. of Justice, Law Enforcement Assistance Administration*, 748 F.2d 1389, 1391-2 (10th Cir. 1984); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35, 36 (4th Cir. 1980). When there is an absence of qualifying language in one section of a statute while other sections contain qualifying language, there is a clear implication that Congress intended the unqualified section to have

broad application. *United States v. Dangdee*, 616 F.2d 1118, 1119-20 (9th Cir. 1980).

2. A study of the evolving language of and amendments made to the original Section 6 also demonstrates that "comparable education" was not intended to be synonymous with or to require identical salaries. In fact, the original language of § 241(a) had to be amended to provide the Army with the *discretion* it now has to pay Section 6 teachers salaries comparable to those in neighboring school districts.

The original language of Section 6 was terse but contained the language that required "comparable education" —the language that the Army claims requires it to pay "comparable salaries." Section 6 of Pub. L. No. 81-874, 64 Stat. 1107, enacted on September 30, 1950, reads in its entirety:

> In the case of children who reside on Federal property—
>
> (1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or
>
> (2) if it is the judgment of the Commissioner [of Education], after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,
>
> the Commissioner shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. To the maximum extent practicable, such education shall be comparable to free public education provided for children in comparable communities in the State.

In 1953 the Act of September 30, 1950, was extended for two more years, and Section 6 of the Act was amended by

requiring that education provided to children outside the continental United States, Alaska, and Hawaii be "comparable to free public education provided for the children in the District of Columbia." A third sentence was added that provided that the agency with whom the Commissioner had arranged to provide such education "may" employ personnel "without regard to the civil service or classification laws." Act of August 8, 1953, ch. 402, § 8, Pub. L. No. 83-248, § 8, 67 Stat. 535 (1953). However, no language was added at the time that exempted Section 6 school personnel from the coverage of other personnel laws that were applicable to Federal employees.

In 1959 a dispute arose between the Department of the Army and the Comptroller General of the United States because the Army sought to establish compensation and leave practices in Section 6 schools that were similar to those in neighboring school districts but that were inconsistent with the Federal Employees Pay Act of 1945 and the Annual and Sick Leave Act of 1951, which were applicable to Federal employees.

On May 15, 1959, the Comptroller General issued decision No. B-138773, which held that the Department of the Army was *not* authorized pursuant to Pub. L. No. 81-874 or the 1953 amendment to Section 6 to compensate teachers at the Section 6 schools of the United States Military Academy, West Point, on the same basis as teachers in the neighboring city of Newburgh, New York, were compensated.[14] In response to a request from the Army for authorization to establish compensation and leave practices at West Point comparable to those in Newburgh, New York, the Comptroller General wrote to the Secretary of the Army in relevant part:

> Your request [to compensate teachers at West Point on the same basis as teachers in Newburgh, New York] appears to be based on implied authority thought to be contained in Section 6 of Public Law 874 and express authority appearing in section 8(b) of Public Law 248.
>
> Section 8(b) of Public Law 248, approved August 8, 1953, amends the earlier statute to provide in pertinent part as follows:
>
> > ". . . For the purpose of providing such comparable education, personnel may be employed without regard to the civil-service or classification laws."
>
> That language has not been construed as exempting employees from other statutes pertaining to Government employment. As pointed out above, some provisions of the Federal Employees Pay Act of 1945, as amended, still would be applicable as would the Uniform Annual and Sick Leave Act of 1951, the Veterans Preference Act and certain other statutes. Some of these would not be compatible with the objectives outlined in the Deputy Assistant Secretary's letter.
>
> We are aware of no way, other than by legislative means, of waiving the application of those statutes to Government employees.

In 1965 Congress finally gave the military departments the authority to establish, in their discretion, compensation and leave practices in Section 6 schools that were comparable to those in the neighboring communities. The Act of July 21, 19[illegible], § 2, Pub. L. No. 89-77, § 2, 79 Stat. 243 (1965) amended the fourth sentence of 20 U.S.C. § 241(a) to read:

> For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship *may* be fixed without regard to the Civil Service Act and rules (5 U.S.C. § 631 *et seq.*) and the following: (1) the Classification Act of 1949, as amended (5 U.S.C. 1071 *et seq.*);

[14] A copy of this decision is reproduced in the addendum to this brief.

> (2) the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. 2061 *et seq.*); (3) the Federal Employees' Pay Act of 1945, as amended (5 U.S.C. 901 *et seq.*); (4) the Veterans' Preference Act of 1944, as amended (5 U.S.C. 851 *et seq.*); and (5) the Performance Rating Act of 1950, as amended (5 U.S.C. 2001 *et seq.*)

(emphasis added).

It is most important to note, as the Comptroller General found, that until this 1965 amendment the military departments did not have the authority to establish compensation and leave practices that varied from those of other Federal employers.[18] Since the law required comparable education for fifteen years without even the authority to establish comparable pay, the language that requires that the quality of education in Section 6 schools be comparable to that in local public schools obviously does not require comparable salaries.

Furthermore, there is nothing in the 1965 amendment that *requires* the military departments to establish compensation and leave practices similar to those in neighboring public schools. The amendment merely states that pay rates *may* be established without regard for the laws that mandate pay for other Federal employees. The authority to negotiate over compensation flows from this discretion.

Since the 1965 amendment, the Army has freely exercised its discretion to pay Section 6 personnel without regard to local practice. Effective July 1, 1969, the Fort Rucker Elementary School Board adopted a policy of having all clerical, janitorial, and other nonteaching positions classified and equated to comparable civil service positions. Under this policy, the Army paid those Section 6 school

[18] The Comptroller General has "a tradition of care and objectivity, including freedom from prior involvement in the matter at hand" and therefore his decisions should be used by the Court as "additional guidance in resolving the issues before it." *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1298 (D.C. Cir. 1971).

personnel on the same basis as equivalent Federal General Schedule and Wage Board employees, including equivalent cost-of-living and salary step increases authorized for other civil service employees. This practice was followed continuously until April 1974, when a pay raise for all Federal employees was not extended to these Section 6 employees by the Army. In 1978 the Fort Rucker School Board passed a resolution that the affected employees be granted retroactive pay increases that were given to other Federal employees. The Finance and Accounting Officer at Fort Rucker sought a Comptroller General ruling on the propriety of such a retroactive pay raise.

In the Matter of Fort Rucker Elementary School Employees, 58 COMP. GEN. 430 (1979), the Comptroller General approved the retroactive salary increases because he found that with the discretion to exempt Section 6 personnel from Federal pay laws came the discretion to extend the coverage of Federal pay laws to Section 6 personnel if the Army so desired:

> This Office has consistently held that "Section 6" school employees are subject to all statutes pertaining to Government employment except those for which exemption is expressly authorized. . . . Moreover, we recognize that the exempted provisions of Title 5 *may be extended* to "Section 6" school employees by operation of administrative directives and contract clauses.

58 COMP. GEN. at 434. (emphasis added). Thus, the Comptroller General has ruled that § 241(a) does not require that compensation practices be comparable to local public schools because the military departments retain the authority to continue to set salaries in accordance with pay practices applicable to other Federal employees. The Army's pay practices at Fort Rucker from 1969 until at least 1978 demonstrate that this, too, has been the Army's long-standing interpretation of § 241(a), which was only abandoned when the negotiability dispute at Fort Stewart and several other Section 6 schools arose.

In his *Fort Rucker* decision, the Comptroller General examined the legislative history of the 1965 amendment and determined that Congress gave the military departments the authority to exempt Section 6 personnel from Federal pay and leave statutes, not out of any concern that the practices be comparable to public schools in surrounding communities but because the application of certain Federal personnel laws was impracticable in the teaching profession. The Comptroller General wrote that the 1965 amendment "was intended to apply primarily to members of the teaching profession, in recognition of the fact that instruction schedules do not coincide with civil service work-hour and leave policies." 58 COMP. GEN. at 433. The Senate Report that accompanied the 1965 amendment contains a letter from the Secretary of the Army. This letter recommended that § 241(a) be amended, not to allow the Army to make compensation and leave practices comparable to those of local school districts, but to allow the Army to make such practices comparable to the profession as a whole. The Secretary explained several problems that were encountered because it was impractical to apply Federal personnel laws to the instructional schedules in the teaching profession, including the following:

> (a) Salary schedules are set up on the basis of a school year consisting of 9 or 10 months. The Federal Employees Pay Act of 1945, as amended, (5 U.S.C. 944(c)(1)) requires computation on a calendar year basis.
>
> (b) Hours of work are established on the length of the school day plus time required to direct extracurricular activities, as opposed to the 40-hour week requirement of the Federal Employees Pay Act of 1945. . . .
>
> (c) No provision is made for overtime pay since teachers are expected to devote whatever time is necessary to preparation for class sessions, grading of papers, and other customary curricular and extracurricular activities.

1965 U.S. CODE CONG. & AD. NEWS 1913. The Secretary of the Army also wrote that:

> Based upon the Department's experience in operating section 6 schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teaching profession rather than those which have been developed for the Federal Service as a whole.

Id. Thus it is clear that the intent of the 1965 amendment was to *allow* the military departments to establish pay and personnel policies "patterned after those usually encountered in the teaching profession"[9] rather than to *require* that teachers be compensated at the same rates paid to teachers in neighboring public schools.[10]

Finally, although Congress amended Section 6 in 1953 to require that education in Section 6 schools outside the continental United States, Alaska, and Hawaii be comparable to the education provided in District of Columbia public schools, it was not until 1978 that Congress amended Section 6 to specifically require that compensation and leave in those schools be comparable to that in the D.C. schools. Act of November 1, 1978, Pub. L. No. 95-561, Title X, § 1009, 92 Stat. 2309 (1978). The 1978 amendment would never have been enacted if pay comparability was required by educational comparability. According to accepted norms of statutory construction, when Congress enacts an amendment, it is presumed to intend a change in legal rights. *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); *Wolf v. J.I.*

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[10] Congress also exempted teachers in DOD's overseas dependents schools from the coverage of certain pay and personnel laws applicable to other federal employees by enacting the Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 901 *et seq.*, for the identical reasons. *March v. U.S.*, 506 F.2d 1306, 1311 (D.C. Cir. 1974).

Case Co., 617 F.Supp. 858, 865 (D. Wis. 1985). There is a presumption that, by enacting a statute, the legislature intends to effect some change in existing law. *Kaup v. Western Casualty & Surety Co.*, 432 F.Supp. 922, 925 (D. Mont. 1977).

3. The Army incorrectly argues that higher salaries at Fort Stewart will undermine the objective of Section 6 because they will somehow burden local school districts. Pet. Br. 34 n.34. Section 6 was added to Pub. L. No. 81-874 not because of the adverse impact that Federal activities had on local communities but to remedy the adverse impact of local communities' policies on the effectiveness of Federal activities. Accordingly, negotiating compensation at Section 6 schools will not interfere with any Congressional goals.

Section 6 was not originally enacted to relieve any burden on local school districts. It was enacted because some local school districts would not cooperate with Federal agencies in operating public schools on Federal installations or allowing children who live on Federal installations to attend public schools. At the time Pub. L. No. 81-874 was enacted, the Army was already operating one school at Fort Benning and two schools at Fort Knox because Georgia and Kentucky authorities would not permit state funds to be used to provide schooling on Federal property. *See Hearings on H.R. 4115 Before the Special Investigating Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 1st Sess. (1949), pp. 11, 13.

Pub. L. No. 81-874 came up for renewal and amendment in 1953. The legislative history clearly indicates why Congress gave the Commissioner of Education the authority to make arrangements with other agencies to operate schools for children who reside on Federal property when, in the Commissioner's judgment, "no local educational agency is able to provide suitable free public education for such children." Section 6 schools were created not because Congress wanted to relieve a burden that may be placed on school districts adjacent to Federal installations but because *many of those neighboring school districts were racially segregated.* During his testimony before a subcommittee of the House Committee on Education and Labor, Acting Commissioner of Education Rall Grigsby stated that Section 6 was being used as authority by the U.S. Office of Education to make arrangements with the military departments to operate schools on military installations when local educational authorities would not provide education to military dependents on an integrated basis. *Hearings Pursuant to H.Res. 115 Before the Special Subcomm. of the House Comm. on Education and Labor*, 83rd Cong., 1st Sess. (1953), pp. 127-130.

The authority to operate Section 6 schools was expanded in 1960 because of local communities' efforts to fight school desegregation. As originally enacted, authority to operate Section 6 schools was reserved "for children who reside on Federal property." Pub. L. No. 81-874, § 6, 64 Stat. 1107. However, the Civil Rights Act of 1960, Pub. L. No. 86-449, Title V, § 501, 74 Stat. 909 (1960), expanded the authority of the Commissioner of Education and the military departments by authorizing the creation of Section 6 schools for military dependents who lived off base when public schools were closed by local authorities in order to avoid Federal court desegregation orders. This amendment reads:

> Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority. . . . .

The House Report that accompanied the Civil Rights Act of 1960 described the nature of the problem and why Section 6 was being amended. The House Report in-

cluded a letter from the Secretary of the Department of Health, Education, and Welfare, which read in part:

> When the public schools in a Federally affected area are closed as the result of State or local attempts to avoid compliance with Federal court decisions or decrees requiring desegregation, children of military personnel, like other children in the community, are deprived of their education. The Federal Government has a particular responsibility for the large numbers of children of military personnel in such Federally affected areas, since armed services personnel are located there under military orders rather than by their own free choice. Under the present law, the Commissioner of Education may provide for the education of children of military personnel only in the case of those who live on military reservations or other Federal properties.
>
> The proposed bill would amend the present laws to enable the Commissioner and the armed services concerned to provide for the education of children of military personnel, regardless of where they live, when the public schools are closed to them.

1960 U.S. CODE CONG. & AD. NEWS 1950. The House Report also reported that the education of 2,500 dependents of military personnel on active duty in Norfolk, Virginia, was recently interrupted when that city closed its public secondary schools to avoid a desegregation order. The House Judiciary Committee also estimated that "the proposed legislation could possibly affect the education of some 70,000 children of military personnel situated in states where the closure of schools is a possibility." *Id.* at 1946.

Although Congress enacted the other provisions of Pub. L. No. 81-874 in order to financially aid school districts impacted by the presence of a Federal activity, Congress expressed no concern for local school districts when it enacted, and subsequently amended, Section 6. The

Army's arguments are an attempt to rewrite history—a history of which it should be proud because the Army Section 6 schools were created as part of the Federal government's efforts to desegregate public education. Even if "comparable education" is construed to entail "comparable compensation," Section 6 does not prohibit the Army or other agencies from providing education in its schools that is *superior* to that provided in the neighboring communities. Congress was only concerned about the welfare of military dependents when it enacted Section 6, and no legitimate purpose would be served to construe Section 6 as a limit on the caliber of education that military dependents are provided, rather than as a guarantee that military dependents are not disadvantaged because they are being educated on base.

Finally, in practical terms, an increase in the pay of teachers at the Fort Stewart schools will not have any negative effect on the financial burden of the surrounding school districts. There are over two thousand teachers employed in the public schools of the five counties that are adjacent to Fort Stewart.[17] However, there are only 114 teachers in the bargaining unit at the Fort Stewart schools. There are simply too few vacancies at Fort Stewart to entice teachers away from the local public school districts in numbers significant enough to force the local school districts to raise salaries in order to retain their personnel. Furthermore, less experienced teachers will not move from local school districts to the Fort Stewart schools because of modest salary differences because they will sacrifice the retirement benefits that have been contributed on their behalf to the Georgia State

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[17] Chatam County (1339); Bryan County (186); Liberty County (385); Tatnall County (182); Long County (57). PUBLIC INFORMATION & PUBLICATIONS DIVISION, OFFICE OF DEPARTMENT MANAGEMENT, GEORGIA DEPT. OF EDUCATION, 1988 DIRECTORY OF GEORGIA PUBLIC EDUCATION—STATE AND LOCAL SCHOOL STAFF, 52, 61-63, 136-137, 168 (1987).

Teacher Retirement System. Those benefits do not vest for ten years. GA. CODE ANN. § 47-3-101. Experienced teachers will not be enticed away from the Georgia public school system solely for a salary increase because the benefits of the Georgia teacher retirement program cannot be fully realized until the teacher completes thirty years' service. *Id.*

B. The Army Has Failed to Demonstrate That § 241e Requires Identical Salary Schedules

Title 20 U.S.C. § 241(e) only requires that the per-pupil costs at Section 6 schools not exceed those in comparable local schools "to the maximum extent practicable." It does not require that salary compensation costs be equal. Assuming that it is not practicable to offset the increased cost of teachers' salaries by other economies in the schools' overall program (and certainly economies can be found in any government program), the Army may exceed per-pupil costs without offending § 241(e) because it is not "practicable" to equalize them *and* meet the bargaining obligations imposed upon the Army by the FSLMR Statute at the same time. Both Section 6 and the FSLMR Statute are acts of Congress advancing important social welfare goals, and both are equally important. The Army's obligations under one law must be balanced with its obligations under the other. Under the FSLMR Statute, the Army *must* bargain over conditions of employment, but under § 241(e) the Army must equalize per-pupil expenditures only if it is "practicable" to do so.

According to a Government Accounting Office study, the Army freely disregards the § 241(e) command to limit the total per-pupil expenditures at its Section 6 schools to those in comparable local school districts. During the 1983-84 school year, the per-pupil expenditures at Fort Stewart were $2,400 compared with $1,448 at adjacent Liberty County. GOVERNMENT ACCOUNTING OFFICE, DOD SCHOOLS—FUNDING AND OPERATING ALTERNATIVES FOR EDUCATION OF DEPENDENTS, 67 (December 1986). Per-pupil expendentures at Fort Benning were $2,636 compared with $2,071 in neighboring Chattahoochee County, Georgia, and $2,431 in neighboring Muscogee County. *Id.* at 66. The Fort Knox schools spent $3,538 per pupil, while neighboring Hardin and Mead Counties, Kentucky, spent $1,600 and $2,500 per pupil, respectively. *Id.* at 70. The Fort Campbell schools spent $2,585 per pupil compared with $1,648 in adjacent Christian County, Kentucky, and $1,671 in adjacent Clarksville-Montgomery County, Tennessee. *Id.* Per-pupil expenditures at Fort Jackson were $2,789 compared with $2,289 in neighboring Richland County, South Carolina. *Id.* at 81. It appears that the Army and the other military services long ago determined that it was not "practicable" to limit the per-pupil expenditures at its Section 6 schools to those in surrounding communities and still provide the quality of education that § 241(a) mandates.[18] Therefore, § 241(e) should not be used as an impediment to bargaining.

Identical salary schedules will not produce identical compensation costs or per-pupil expenditures. There are eighteen different steps on each of four different pay lanes on the current Fort Stewart teachers' salary schedule. A teacher's pay, depending on his or her terminal degree and years of experience, could range anywhere from $21,528 to $40,726. If the Fort Stewart salary schedule is identical to that in local public schools, the professional qualifications and number of years of experience possessed by both the teachers at Fort Stewart and those in the local school districts would also have to

[18] The per-pupil expenditures at the Section 6 schools at Maxwell Air Force Base, Robbins Air Force Base, and Myrtle Beach Air Force Base also dramatically exceed those in the surrounding communities. *Id.* at 63, 69, 83. The same is true at the Dahlgren, Virginia, Naval Surface Weapons Center and the Quantico Marine Corps Base. *Id.* at 84, 86.

be identical in order to produce identical compensation costs and per-pupil expenditures.

Even assuming that the salary costs at Fort Stewart and selected Georgia school districts are presently comparable, other significant portions of the teachers' total compensation package are already unequal. Teachers at Fort Stewart who were employed prior to December 31, 1983, are covered by the Federal Civil Service Retirement System, 5 U.S.C. § 8301 *et seq.* The Army contributes 7% of each employee's basic pay to the Civil Service Retirement Fund and nothing to the Social Security Fund. Georgia school districts adjacent to Fort Stewart contribute 13.65% of each teacher's salary rate to the Teacher Retirement System of Georgia. GA. ANN. CODE § 47-3-1 *et seq.*, plus 7.51% to the Social Security Fund. Assuming that salaries are currently equal, the Army must immediately raise the salary of teachers employed prior to 1984 *14.16%* to have the total compensation costs for those teachers equal the costs of similar teachers in Georgia public schools. Fort Stewart teachers are also covered by different health insurance programs (compare 5 U.S.C. §§ 8901 *et seq.* with GA. CODE ANN. § 20-2-880 *et seq.*), as well as different life insurance and disability programs. The claim that compensation costs are, and must remain, equal is a myth.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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December 15, 1989

ADDENDUM

ADDENDUM

[SEAL]

COMPTROLLER GENERAL
OF THE UNITED STATES

Washington 25

B-138773 May 15, 1959

Dear Mr. Secretary:

On February 12, 1959, your Deputy Assistant Secretary requested our decision concerning a proposal now under consideration by your Department to effect a change in the method of procuring teachers and other suitable personnel for the operation of the dependents' school at the United States Military Academy, West Point, New York.

At the present time all employees of the depedents' school at West Point are serving under Civil Service competitive appointments in positions subject to the Classification Act of 1949 (5 U.S.C. 1071), as amended. If and when the proposed change is effected, all new employees are to be given excepted appointments without specific time limitation. The positions of all employees are to be exempted from the Classification Act of 1949 (5 U.S.C. 1081), as amended, and salary rates are to be established, subject to the approval of the Commissioner of Education, Department of Health, Education, and Welfare, on the basis of rates of pay and conditions of employment prescribed for teachers in public school systems in the area—in this case the City of Newburgh, New York.

Your proposal to change the method of effecting employment by prescribing rates of pay and hours of duty for employees of the dependents' school is to conform with the authority provided in section 6 of the act of September 30, 1950, Public Law 874, 64 Stat. 1100, as amended (20 U.S.C. 237). Section 6 of that act author-

izes the Commissioner of Education to make arrangements for the provision of free public education for children residing on Federal property when no legal agency is able to provide suitable free public education for them. Specifically, your Department, on page 2 of the letter, requests our views as to whether the procedural changes hereinafter described, which are not fully in accord with Federal employment legislation—particularly the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, and the Annual and Sick Leave Act of 1951, 65 Stat. 679, as amended—properly may be effected.

The changes referred to are as follows:

"a. School-year salary schedules for teachers are established on a 10-month basis.

"b. Experience and training factors are considered in determining the salary rate payable upon initial employment.

"c. Fixed amounts are added to the yearly rate to recognize educational acquirements; for example, $300 is added to the yearly rate for persons having either an M.A. degree or a Bachelor's Degree plus 30 semester hours in approved courses.

"d. Fixed amounts are added to the yearly salary rate in payment for extra-curricular activities; for example, $100 is added to the yearly rate for each coaching assignment, limited to a total of $300 for all such activities.

"e. Salary schedules are reviewed annually and adjusted to reflect rates prevailing in the area.

"f. The occurrence of school holidays, such as Thanksgiving, Christmas and spring vacations, has no effect on the amount of salary payable for the period involved.

"g. Hours of work are determined by the duration of the school day plus time required to direct

extra-curricular activities, as distinguished from a regularly scheduled weekly tour consisting of a prescribed number of hours per day for a set number of days per week.

"h. Aside from the increased salary rate provided for extra-curricular activities (d above), no provision is made for overtime pay."

Your request appears to be based on implied authority thought to be contained in section 6 of Public Law 874 and express authority appearing in section 8(b) of Public Law 248.

Section 8(b) of Public Law 248, approved August 8, 1953, amends the earlier statute to provide in pertinent part as follows:

"* * * For the purpose of providing such comparable education, personnel may be employed without regard to the civil service or classification laws."

That language has not been construed as exempting employees from other statutes pertaining to Government employment. As pointed out above, some provisions of the Federal Employees Pay Act of 1945, as amended, still would be applicable as would be the Uniform Annual and Sick Leave Act of 1951; the Veterans Preference Act and certain other statutes. Some of these would not be compatible with the objectives outlined in the Deputy Assistant Secretary's letter.

We are aware of no way, other than by legislative means, of waiving the application of those statutes to Government employees. Thus, our answer to the specific question on page 2 of the letter must be in the negative.

Sincerely yours,

/s/ Joseph Campbell
Comptroller General
of the United States

The Honorable
The Secretary of the Army